Supreme Court, U. S.
FILED
MAY 23 1975
MICHAEL RODAK, JR., CLERK

No. 74-1476

In the Supreme Court of the United States

OCTOBER TERM, 1974

UNITED STATES OF AMERICA, PETITIONER

v.

WILLIE FOSTER SELLERS

MOTION FOR LEAVE TO FILE A CROSS-PETITION FOR A WRIT OF CERTIORARI OUT OF TIME UNDER RULE 22(2) OF THE RULES OF THIS COURT AND CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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WILLIE FOSTER SELLERS

MOTION FOR LEAVE TO FILE A CROSS-PETITION FOR A WRIT OF CERTIORARI OUT OF TIME UNDER RULE 22(2) OF THE RULES OF THIS COURT

The Solicitor General, on behalf of the United States, moves for leave to file a cross-petition for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit, although out of time under Rule 22(2) of the Rules of this Court.

1. The decision of the court of appeals in this case substantially supported the government's position. The court rejected Sellers' arguments based upon the Fourth and Sixth Amendments and upheld his conviction for possession of the proceeds of a bank robbery. The court did, however, set aside his additional conviction for the robbery itself. Ordinarily, we would not have sought certiorari to review that portion of the court's decision.

576-770—75——1

Sellers has, however, sought a writ of certiorari to review the decision below (No. 74–6503). One of the issues he has presented is whether *Milanovich* v. *United States,* 365 U.S. 551, required the court of appeals to vacate his conviction on all counts and remand for a new trial. We have argued in *United States* v. *Gaddis,* petition for writ of certiorari pending, No. 74–1141, that *Milanovich* should not so require, and that, if it does, it should be overruled. The issue presented by Sellers in this case overlaps the issue we have presented in *Gaddis,* and the decision of the court of appeals conflicts with the Fifth Circuit's decision in *Gaddis.*

In view of this conflict and the pendency of our petition in *Gaddis,* we intend to acquiesce in the grant of that portion of Sellers' petition relating to this issue, provided the Court does not deny our petition in *Gaddis.* However, if this Court grants Sellers' petition it will not have the whole case before it unless it also grants this cross-petition. The position we will take in *Gaddis* and in the instant cross-petition would lead to the conclusion, in this case, that Sellers' robbery conviction should be reinstated. This would require an alteration of the judgment of the court of appeals and therefore would not properly be before this Court unless it grants this cross-petition. See *Strunk* v. *United States,* 412 U.S. 434, 437; Stern, *When to Cross-Appeal or Cross-Petition—Certainty or Confusion?,* 87 Harv. L. Rev. 763 (1974).

If the Court is going to undertake a review of this recurring problem area, it should have before it all

the possible options for resolving the problems. If the cross-petition is not granted, an important option—in our view the best one—will not be available to the Court.

2. It is the policy of the Department of Justice not to file petitions out of time except in extraordinary circumstances. We believe that circumstances justifying late filing exist here.

In the instant case, although we were of the view that the preferable result would have been to affirm the robbery conviction and vacate the possession conviction (a result that could be reached only by overruling *Milanovich*), we were prepared to accept the judgment of the court of appeals rather than to seek further review by this Court. Only if petitioner were to seek certiorari on this issue did we believe we should seek review ourselves, by means of a conditional cross-petition. Since, as described below, we had reason to expect (mistakenly, as it turned out) that Sellers would seek rehearing in the court of appeals rather than certiorari, we determined not to file our own petition at the time.

After the court of appeals' decision, negotiations commenced between Sellers' counsel and the United States Attorney, with a view to termination of the litigation without the need for review by this Court. Before these negotiations could be completed, however, Sellers' court-appointed attorney went on vacation. In the interim, Sellers filed a *pro se* motion in the court of appeals to extend the time to petition for rehearing. The court granted that motion, and we were informed by the United States Attorney that he ex-

pected Sellers or his counsel to seek rehearing in the court of appeals before petitioning for certiorari. We therefore did not file a petition for certiorari or a motion for an extension of time to do so, but planned to await the court of appeals' decision on the expected petition for rehearing. By the time we received Sellers' petition for certiorari, our time to petition had expired.

3. The 30-day time limit prescribed in Rule 22(2) of the Rules of this Court is "not jurisdictional and can be relaxed by the Court in the exercise of its discretion when the ends of justice so require" (*Schacht* v. *United States*, 398 U.S. 58, 64). This is an appropriate case for such relaxation, because the full case (and the full range of possible approaches to the *Heflin-Milanovich* problem) will be before the Court only if it entertains both the issue raised in Sellers' petition and the issue raised in this cross-petition.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

MAY 1975.

In the Supreme Court of the United States

OCTOBER TERM, 1974

No.

UNITED STATES OF AMERICA, PETITIONER

v.

WILLIE FOSTER SELLERS

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Solicitor General, on behalf of the United States, cross-petitions for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit in this case, but only if this Court grants the related portion of the petition for a writ of certiorari (No. 74-6503) previously filed by respondent Sellers.

OPINION BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 15–25) is not yet reported. The district court rendered no opinion.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, p. 26) was entered on April 10, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether *Milanovich* v. *United States,* 365 U.S. 551, should be overruled.

2. Whether, assuming there must be a new trial in this case, the issue upon such retrial should be confined to the question whether respondent should be convicted of robbery or of possession.

STATUTE INVOLVED

The federal bank robbery statute, 18 U.S.C. 2113, is set out in Appendix C, *infra.*

STATEMENT [1]

In a four-count indictment in the Western District of North Carolina, respondent Sellers was charged with the armed robbery of the Fallston Branch of the Union Trust Company of Shelby, North Carolina, in violation of 18 U.S.C. 2113(a), (b) and (d), and with possession of the proceeds of the robbery, in violation of 18 U.S.C. 2113(c).

As summarized in the opinion of the court of appeals (App. A, *infra,* pp. 15–16), the evidence introduced at trial showed that on the night of August 8, 1973, a blue Ford automobile was stolen in Charlotte, North Carolina. A policeman who noticed the car driving off identified Sellers as one of its occupants.

[1] This Statement discusses only those facts relevant to the questions we present. Other aspects of this case, relevant to unrelated questions that Sellers has presented in No. 74–6503, will be discussed in our memorandum responding to his petition. Assuming this Court does not deny our pending petition in *United States* v. *Gaddis* (No. 74–1141), we will not oppose grant of Sellers' petition in No. 74–6503, insofar as it deals with the *Heflin-Milanovich* issue.

The next day, two armed men wearing ski masks robbed the Fallston Branch of nearly $63,000. Included in the loot was a quantity of marked bills known as "bait" money. Although no one could identify the masked robbers, one witness testified that the men made their getaway in a blue Ford. The stolen Ford was found, abandoned, approximately one mile from the bank. Earlier that same day, Sellers again had been observed riding in a blue Ford in the vicinity of Fallston.

After Sellers had been arrested and charged with the robbery, officers armed with a warrant searched Sellers' apartment in Atlanta, Georgia. They discovered a shoebox containing $33,150 in cash, including $500 of the "bait" money from the Fallston Branch. The officers also recovered a full head costume mask and a snub-nosed revolver (Tr. 255–258).

The district court's charge to the jury permitted it to convict Sellers on all counts (Tr. 331–332); the court did not charge (as it should have done in light of *Heflin* v. *United States,* 358 U.S. 415) that the jury ought not to convict Sellers of possession of the proceeds if it convicted him of the robbery itself. The jury returned a verdict of guilty on all four counts (Tr. 335–336). The district court then ruled that, for purposes of sentencing, it would "consolidate" all four counts; it sentenced Sellers to a general term of 20 years' imprisonment, to run consecutively to any other term he was serving (Tr. 341–342).

The court of appeals held that it was improper to submit the case to the jury with instructions that permitted it to convict Sellers on all four counts (App.

A, *infra,* p. 24). The court went on to hold, however, that it would be unnecessary to vacate the convictions and sentence and remand for a new trial on all counts. It reasoned that any prejudice caused to Sellers by the improper submission to the jury could be cured by vacating the convictions on the robbery counts; because the proof of guilt on the possession count was "overwhelming" and "the proof on the theft counts circumstantial" (*id.* at 25), the court permitted the government to stipulate to a dismissal of the robbery counts. If the government so stipulated on remand, the court held, the district court would be required only to resentence Sellers on the possession count, the maximum sentence for which would be ten years' imprisonment. On the other hand, if the government declined to so stipulate, the district court was instructed to hold a new trial on all counts (*ibid.*).

REASONS FOR GRANTING THE WRIT

This case presents a question subtly different from that we presented in *United States* v. *Gaddis,* petition for writ of certiorari pending, No. 74–1141. In order for this Court effectively to consider the full panoply of *Heflin-Milanovich* problems—which appear to arise with dismaying frequency—and the full range of possible solutions, it is important that it grant this cross-petition as well as our petition in *Gaddis* and Sellers' petition in this case.

1. In *Gaddis,* all of the evidence presented at trial demonstrated that the defendants had robbed a bank and taken away the proceeds; there was no independent evidence that they possessed any proceeds except

as a result of their personal theft of them. Thus, in contrast to the instant case and to *Milanovich,* a verdict of guilty on the possession count would have been entirely inconsistent with an acquittal on the robbery charge. We accordingly contend in *Gaddis* that it would not be inconsistent with *Milanovich* for an appellate court, when faced on such facts with convictions for both the robbery and the subsequent possession, to vacate the possession conviction and affirm the robbery conviction.[2]

Here, by contrast, the evidence (although strong on both counts) is overwhelming on the possession count; there is, moreover, an evidentiary basis for a conviction on the possession count even if Sellers were to be acquitted on the robbery count. Sellers received, as part of his general sentence on all four counts, a term of imprisonment greater than that permitted for possession alone. The court of appeals, in a decision that paralleled our reasoning in our petition in *Gaddis* (compare *Gaddis* Pet. 10–12 with App. A, *infra,* pp. 24–25), concluded that, if the robbery convictions were dismissed, the conviction for possession of the proceeds should be permitted to stand, with appropriate resentencing.

The court of appeals did not, however, accept in full the reasoning we advanced in *Gaddis.* We have argued (*Gaddis* Pet. 13) that because, under *Heflin,* anyone *except* a robber can commit the crime of possession of the proceeds, the first inquiry of either a jury or an appellate court ought to be "Is the accused a robber?"

[2] We are furnishing to Sellers copies of our petition for certiorari and supplemental memorandum in *Gaddis.*

576-770—75——2

If the answer is "yes," then the possession count is superfluous. In this case the question "Is the accused a robber?" was submitted to the jury, which answered "Yes." It therefore would have been proper in our view for the court of appeals to have affirmed the robbery counts.[3]

We recognize, however, that on the facts of this case the court of appeals was precluded by *Milanovich* from reaching such a result. In *Milanovich* itself, the accused had been convicted of both larceny and possession of the proceeds of the larceny. As here, the evidence in support of the possession count was stronger than the evidence in support of the theft count, and the district court imposed unequal but concurrent sentences, the longer one exceeding the sentence authorized for a conviction on the possession count alone. In order to adopt our position in this case and reinstate Sellers' conviction for robbery, the Court would have

[3] Ordinarily, it would also be appropriate under such circumstances to vacate the conviction on the possession count. But such action could cause problems in some cases if done before the robbery conviction has become final; if the robbery conviction later is reversed for deficiencies that do not taint the possession conviction, it might be difficult or impossible to reinstate what is an otherwise proper conviction for possession (or to undo an "acquittal" produced solely by a directive to the jury that it must convict of only one offense even if the evidence establishes all elements of both). In our view, the focal objection is to the cumulation of punishments for both offenses, which was the evil redressed in *Heflin*.

We intend to explore these ramifications at greater length in our brief on the merits, should the Court grant this petition and/or our *Gaddis* petition.

to overrule *Milanovich*. That, we submit, is the best approach to this problem.

Accordingly, if this Court grants Sellers' petition in No. 74–6503 insofar as it raises the *Heflin-Milanovich* issue, it should grant this cross-petition so that it will be able fully to consider all aspects of the issue in this case and have available to it the alternative of overruling *Milanovich*, should it believe such a course warranted.

2. Under the decision of the court of appeals, a new trial will be required unless the government dismisses the robbery charges against Sellers. Similarly, a new trial will be required if Sellers' petition is granted and the court of appeals' decision is reversed by this Court, adhering to *Milanovich* and applying it to this situation. One issue that has not so far been addressed by court or counsel in this litigation (or, to our knowledge, in other *Milanovich*-type cases) is whether, upon such a retrial, the defendant can relitigate the general question of guilt or innocence—a question which already has been resolved favorably to the government by the jury in a trial that was error-free in respect to the determination that the defendant was guilty of some offense. We submit that such plenary relitigation should not be required.

The only defect in the first trial derived from the rendition of guilty verdicts on mutually exclusive offenses, in violation of *Milanovich*. That defect can be fully cured by a retrial limited to the question whether Sellers should be convicted of robbery or of possession.

There is no justification for burdening the courts or the prosecutors with complete relitigation of issues resolved adversely to defendants in the first trial or of creating the possibility of a windfall acquittal on all counts because of unavailability of evidence at a second trial.[4] The Court's opinion in *Milanovich* intimated (365 U.S. at 555) that a full retrial would be required because a properly instructed jury might have acquitted entirely. We submit, however, that it is virtually inconceivable that a jury convinced beyond a reasonable doubt of the accused's complicity in both robbery and possession of the proceeds would, if instructed that it could convict of but one, decide to acquit of both.

The jury that convicted Sellers had decided that, beyond a reasonable doubt, he engaged in all of the acts that constitute both crimes. The only bar to conviction of both crimes is this Court's conclusion, in *Heflin,* that Congress did not desire to create two crimes from what was essentially a single criminal transaction. The jury's ignorance of this rule does not impeach its conclusion that Sellers performed all of the illegal acts necessary to support his conviction. Therefore, the only question open to resolution upon

[4] We cannot accurately evaluate the probability that Sellers would receive such an unwarranted windfall. However, in *Gaddis* a full retrial likely would entail such a risk; the government's principal and probably indispensable witness has announced an intention not to testify at the retrial unless afforded a reduction in sentence for his part in the crime (*Gaddis* Pet. 7, n. 3)—a reduction that is beyond the power of either the court or the prosecution to provide. Problems involving loss of evidence occur in many other cases as well.

retrial ought to be whether he is culpable for the robbery or the possession. Under the usual principles of collateral estoppel, which apply in criminal cases (*Ashe* v. *Swensen,* 397 U.S. 436), he should not be entitled to seek to overturn the first jury's conclusion that he committed the acts constituting the offense.

It is superficially plausible that our arguments in this regard should be presented to the district court on remand rather than to this Court. We think it appropriate, however, for this Court to pass upon the matter at this stage of the litigation because our suggestion is arguably inconsistent with the above-discussed language in the *Milanovich* opinion (365 U.S. at 555), and we doubt that the district court or a court of appeals would feel free to disregard that language, even in light of the intervening decision in *Ashe.* Moreover, unless the issue is resolved in this Court, it will be impossible for the government to obtain review of an adverse decision by the district court. If that court decides to resubmit the general question of guilt or innocence to the jury, and the government prevails before that jury, it will have no grievance requiring appellate review. On the other hand, if the jury, so instructed, acquits, the Double Jeopardy Clause will preclude another retrial with proper instructions. Moreover, in either event there will have been burdensome and unnecessary relitigation of issues already fairly decided. We therefore believe that it would be appropriate, if this Court decides that Sellers must be retried, for the Court to indicate what issues would be open on such retrial.

CONCLUSION

This cross-petition for a writ of certiorari should be granted if the Court grants the writ in No. 74–6503, previously filed by Sellers.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.
JOHN C. KEENEY,
Acting Assistant Attorney General.
FRANK H. EASTERBROOK,
Assistant to the Solicitor General.

MAY 1975.

APPENDIX A

United States Court of Appeals for the Fourth Circuit

No. 74–1683

UNITED STATES OF AMERICA, APPELLEE

against

WILLIE FOSTER SELLERS, APPELLANT

Appeal from the United States District Court for the Western District of North Carolina, at Asheville, N.C., Wilson Warlick, District Judge.

Argued January 6, 1975—Decided April 10, 1975

Before CLARK, Supreme Court Justice*, HAYNSWORTH, Chief Judge, and WINTER, Circuit Judge.

Robert B. Thomson [Court-appointed counsel] for Appellant; Jimmie C. Proctor, Assistant United States Attorney (Keith S. Snyder, United States Attorney, on brief) for Appellee.

MR. JUSTICE CLARK:

The appellant, Willie Foster Sellers, stands convicted by a jury on four counts of armed robbery of the Fallston branch of the Union Trust Company of

*Sitting by Designation.

Shelby, N.C., on August 9, 1973. He raises three claims of error: (1) the FBI's search of his apartment violated his Fourth Amendment rights; (2) the failure of his attorney to subpoena several witnesses violated his Sixth Amendment rights; and (3) his conviction for both theft and possession of stolen money was improper. We discuss these issues seriatim.

I.

At the trial, a variety of evidence linked appellant to the bank robbery. Testimony revealed that on the night of August 8, 1973, a blue Ford automobile was stolen from the parking lot in front of the Cloud Nine Lounge in Charlotte, N.C. A policeman on routine patrol duty happened to notice the car being driven off and later identified Sellers as one of the passengers. The next day, two armed men wearing ski masks robbed the Union Trust in Fallston of nearly $63,000 including a quantity of marked bills known as "bait money." Though none could identify the robbers, one witness to the theft saw the men make a getaway in the blue Ford, later found abandoned about a mile from the bank. Earlier in the day, according to other testimony, two witnesses had seen Sellers riding in the car in the vicinity of Fallston.

The most incriminating evidence, however, came from a warrant search of appellant's apartment in Atlanta, Georgia, following his arrest on September 25, 1973. There, tucked in a shoebox containing $33,150 in cash, agents found $500 of the "bait money" from the Fallston bank. In a pre-trial motion to suppress this crucial piece of evidence, Sellers attacked the affidavit supporting the warrant as lacking probable cause, but the district court rejected the claim. On appeal, he renews his attack, but we also must reject it.

In the circumstances of this case, the warrant must stand or fall on the basis of the written affidavit.[1] We therefore set out the entire document:

> I, Michael J. Santimauro, being duly sworn, depose and on oath say the following:
>
> On or about January 17, 1973, a confidential source advised Special Agent Raymond W. Stratton of the Chicago Office, Federal Bureau of Investigation, that Willie Foster Sellers was a known member and/or associate of the "McGuire Gang", headquartered in Chicago, which have been committing bank robbery offenses in the Southeastern United States, including Alabama, Georgia, Tennessee, and the Carolinas, in which handguns, sawed-off shotguns and machine guns were used. The modus operandi utilized was that the participants always used facial disguises such as ski masks, costume face masks, hood, and are completely clothed from head to toe. They steal cars for the getaway and for the "switch" car, usually the day before the robbery from a public parking lot such as a shopping center and/or hospital. After the robbery they hide in the woods and are subsequently picked up by another member in a "cool" car.
>
> On September 23, 1973, a confidential source advised Special Agent Lee R. Wagner that Willie Foster Sellers had committed a recent number of bank robbery offenses in the South,

[1] At the suppression hearing, the Government sought to bolster the affidavit by the testimony of the issuing magistrate regarding matters discussed between himself and the FBI agent seeking the warrant. These matters were neither sworn to nor recorded as required by Fed. R. Crim. P. 41(c) and must therefore be disregarded. *See United States* v. *Acosta*, 501 F. 2d 1330 (5th Cir. 1974).

particularly Georgia and South Carolina, stating he was utilizing ski masks, facial and costume masks and utilizing the same modus operandi as set out above. This source advised that Sellers and his accomplices were responsible for a recent bank robbery in Northern Georgia in which the bank camera was sprayed with paint.

On June 22, 1973, the Citizens Bank, Ball Ground, Georgia, was robbed by three white males armed with carbine and pistols, all wearing ski masks and similar type clothing with getaway made in a stolen automobile and abandoned in a wooded area within a five-mile radius of the bank. The modus operandi and the description of the unknown subjects fit the general description of Sellers and the two accomplices named by the source.

On September 25, 1973, at 7:30 A.M., I participated in the arrest of Willie Foster Sellers based on a federal warrant charging him with unlawful flight to avoid confinement—burglary and escape—issued May 21, 1971, Southern District of Alabama. Sellers was arrested outside his apartment. Information received on September 23, 1973, was such that he was traveling with other armed accomplices. The Apartment G–10 was entered in an effort to locate these individuals. In the bedroom I observed in plain view one costume type mask and brown gloves, similar to those used in the Citizens Bank robbery. In the same room, also in plain view, in an open drawer of a night stand was a loaded revolver. Various trunks, grips and packages were also observed in the apartment which are believed to contain further bank robbery paraphernalia. Upon arrest Sellers was in the process of placing some of the above trunks and luggage in the above described vehicle. The keys to this vehicle were in the possession of both Sellers and his wife, Barbara.

Review of FBI identification records shows that on three separate occasions Sellers had been convicted and sentenced on charges of burglary.

Appellant first seeks to undercut the affidavit by stripping away the corroborating detail contained in the next-to-the-last paragraph regarding the mask, gun, and gloves observed in appellant's bedroom. Sellers' theory is that the warrantless entry of the apartment immediately after his arrest was itself a Fourth Amendment violation and could not be used to support probable cause. The Government defends the search under the so-called "protective sweep" theory. The relevant facts are these.

In late September of 1973, the FBI received a report from an unidentified informant that Sellers, who was a suspect in several bank robberies and a fugitive from confinement, could be found in Apartment G–10 of the Buford Towne Apartments in a suburb of Atlanta. This was corroborated through the apartment manager who identified a photograph of appellant but advised that he was not then at the apartment. On the evening of September 24th, the manager contacted the FBI and notified them that Sellers had returned. Setting up surveillance around the apartment building, the agents waited for Sellers to appear.

Early on the morning of September 25th, a light came on and, at about 7:30 A.M., Sellers left the building and walked to his car, which he began to load with luggage. As he closed the car trunk, he was arrested on an unlawful flight warrant. Simultaneously, several of the agents rushed up the stairs to Sellers' second floor apartment, which overlooked the parking lot directly above where appellant's car was parked. According to their testimony, the agents feared that armed accomplices, who had reportedly been travelling with Sellers, might observe the arrest and fire on the arresting offi-

cers. Since their informant had already been proven correct on the exact location of Sellers' apartment and also on the make and color of appellant's car, the agents' fears could hardly be called unreasonable.

Entering the apartment, the agents hurriedly checked the rooms for occupants, but found only Mrs. Sellers and her two children. However, one agent noticed a pistol in the open drawer of the bedroom nightstand and a costume mask and a pair of gloves in the open bedroom closet. Although this incriminating evidence was seen in plain view, nothing was seized during the cursory search of the apartment. Instead, the agents sought a search warrant based on these observations and on reports of appellant's involvement in bank robberies by two unidentified informants.

Appellant argues that this "protective sweep" of the apartment by the agents was entirely unwarranted. Under the doctrine of *Jones* v. *United States,* 357 U.S. 493 (1958), of course, probable cause for the belief that certain articles subject to seizure are in a dwelling cannot of itself justify a search without a warrant, and it follows that a search for a person or persons should be no less restrictive. Emphasizing that the exceptions to the rule that a search must rest upon a search warrant are jealously guarded, appellant points to the following circumstances: (a) the agents here had seen no activity all during the night save the turning on of a light around 6 A.M.; (b) Sellers was unarmed at the time he was arrested and gave no resistance; (c) Sellers' wife and children were standing at the open door of his upstairs apartment and the officers had a commanding view of the portion of the apartment which overlooked the parking lot where the arrest took place; (d) the officers made no effort to secure a search warrant; and (e) while it is conjectural whether one could have been obtained, the

fact is that the only additional information made available by the search was that no accomplices were present. Given these facts, Sellers contends that there were no "exigent circumstances" to justify the intrusion, citing *United States* v. *Basurto,* 497 F. 2d 781 (9th Cir. 1974); *United States* v. *Cooks,* 493 F. 2d 668 (7th Cir. 1974); and *United States* v. *Gamble,* 473 F. 2d 1274 (7th Cir. 1973).

We do not find appellant's cases helpful. In none of them did the officers have reasonable grounds, such as those here, to believe that the arrestee was travelling with armed associates. On the other hand there are several cases which are more instructive. For example, in *United States* v. *Looney,* 481 F. 2d 31, 33 (5th Cir. 1973), the court approved the conduct of agents in making "a cursory security search to protect their lives" when the arrestee's confederates might be present. Furthermore, the Eighth Circuit has upheld an officer's "right to conduct a quick and cursory viewing of the apartment area for the presence of other persons who might present a security risk." *United States* v. *Briddle,* 436 F. 2d 4, 7 (8th Cir. 1970); *accord United States* v. *Blake,* 484 F. 2d 50, 57 (8th Cir. 1973). We therefore find no constitutional infirmity in the agents' cursory sweep of Sellers' apartment, and in turn find it to be the linchpin of the search warrant affidavit.

Sellers attacks the affidavit on the grounds that—even with the allegations about the gun, mask, and gloves spotted during the "protective sweep"—it does not allege that the informers were reliable nor does it allege sufficient facts for the magistrate to so conclude. Appellant argues that:

> Handguns and gloves are common items to be found in most any residence. While a costume mask, even a month before Halloween, may be

> an unusual item to find in a dwelling, in the context of this case it certainly is not sufficient to establish probable cause.

We cannot agree. As he admits himself in his brief, "the mask connects with the informer's tip, as in *Spinelli,* where the informer's tip is a necessary element in the finding of probable cause." The observations of the agents in their initial sweep of Sellers' apartment provide ample corroboration for the informers' allegations of appellant's complicity in bank robbery. *See Draper* v. *United States,* 358 U.S. 307 (1959); *United States* v. *Simpson,* 453 F. 2d 1028 (10th Cir.), cert. den. 408 U.S. 925 (1972).

II.

Appellant urges that his Sixth Amendment rights were violated by the conduct of his trial counsel and by the district court's denial of his motion for compulsory production of witnesses. We see no merit to these claims.

It appears from the record that Sellers' counsel was initially retained by appellant's family for a fee of some $1,000. On April 25, 1974, an evidentiary hearing was held on appellant's motion to suppress the evidence seized in the September 25, 1973, search of his apartment and counsel vigorously acted on behalf of Sellers at that hearing. At the end of the day, the court appointed him to serve as Sellers' counsel when it was determined that appellant was indigent and his family could no longer pay for retained counsel. By letter filed May 3, 1974, the motion to suppress was denied, and on May 7, 1974, counsel conferred with the district court in an effort to secure an interlocutory appeal of the ruling.

The next day, May 8th, when the trial was scheduled to begin, an associate of appellant's counsel appeared

in court and announced that the latter desired to withdraw from the case, allegedly because his relationship with Sellers had deteriorated. The district court was incredulous, pointing out that only the day before no indication of such a difficulty had been manifested. Sellers himself remarked in open court that his counsel was "a first-rate lawyer." The trial judge then insisted that counsel make his appearance and that the trial proceed as schedule.

At that point, appellant raised the issue of his counsel's failure to subpoena three witnesses who, according to Sellers, could exonerate him. When Sellers' attorney finally appeared, a lengthy colloquy ensued in which affidavits from three inmates of the federal prison at Marion, Illinois, were produced. These inmates—one of whom was a personal friend of appellant—offered to identify as the true bank robbers certain unnamed parties whose conversations and letters supposedly boasted of their feats. Both appellant and his counsel disclaimed knowledge of how the inmates learned of the case and of counsel's name even though the affidavits referred to previous contact with the counsel.

Prior to trial, a hearing was held on appellant's motion for a continuance and his request to subpoena these and other witnesses. Sellers took the stand and defended the pertinency of his list of proposed witnesses. From the transcript of proceedings, it appears that the trial judge found appellant's assertions that his counsel refused to subpoena these witnesses to be incredible and therefore denied the continuance and the subpoenas. Under Fed. R. Crim. P. 17(b), a defendant must make a satisfactory showing that "the presence of the witness is necessary to an adequate defense" in order to be entitled to compulsory process. Here, appellant failed of his burden, since, as the

trial court later explained to Sellers, "none of the things that you say they would testify to would have been relevant or competent or admissible in evidence." We thus conclude that appellant was denied neither effective assistance of counsel nor the right to witnesses in his own behalf as guaranteed by the Sixth Amendment.

III.

We turn then to appellant's last contention. Sellers claims that the case was improperly submitted to the jury under instructions which allowed them to convict him of both possession of stolen bank funds under 18 U.S.C. § 2113 (c) and theft of bank funds under 18 U.S.C. § 2113 (a), (b) & (d). We agree. Under *Heflin* v. *United States,* 358 U.S. 415 (1959), it is firmly established that § 2113(c) was not enacted to enhance the punishment for one who robs a bank but only to provide punishment for a separate and distinct class, those who receive the loot from the robber. *Accord Milanovich* v. *United States,* 365 U.S. 551 (1961). We are unpersuaded by the Government's proffered distinction between "receiving" and "possession" and decline to follow *United States* v. *Tyler,* 466 F. 2d 920 (9th Cir.), cert. den., 409 U.S. 1045 (1972); nothing in the legislative history of § 2113(c) or the Supreme Court's opinion in *Heflin* would justify such a distinction.

The question remains as to the proper remedy in such circumstances. Here, the trial court imposed a single, general 20-year sentence on appellant for all of the counts. Although Sellers could have been sentenced for up to 25 years on § 2113(d) or 20 years on § 2113(a), the maximum sentence available under § 2113(c) is only ten years. Since the penalty which was actually imposed exceeds that prescribed for the

possession count, the rule of judicial convenience employed in *United States* v. *Mims,* 340 F. 2d 851 (7th Cir. 1965) is therefore inapplicable. Searching the cases for guidance, we note that the Fifth Circuit would apparently require a new trial without further ado, *see United States* v. *Abercrombie,* 480 F. 2d 961, 964 (5th Cir. 1973), *United States* v. *Gaddis,* 506 F. 2d 352 (5th Cir. 1975).

We think, however, that there is another solution short of a new trial which would suffice "to cure any prejudice resulting from the trial judge's failure to instruct the jury properly," *Milanovich, supra,* 365 U.S. at 555. *Cf. United States* v. *Lemonakis,* 485 F. 2d 941, 966 (D.C. Cir. 1973). Since the proof of guilt on the possession count is overwhelming and the proof on the theft counts circumstantial, a stipulation by the Government that proof of guilt went only to the lesser count would give appellant the benefit of the doubt and justify our vacating the three theft counts. If, on remand, such a stipulation is entered, it remains necessary for the court to resentence Sellers on the possession count alone. Should the government choose not to so stipulate, the conviction on all counts will be vacated and Sellers awarded a new trial.

For the reasons stated, the judgment is set aside, and the case remanded to the district court for proceedings consistent with this opinion.

It is so ordered.

APPENDIX B

JUDGMENT

United States Court of Appeals for the Fourth Circuit

No. 74–1683

UNITED STATES OF AMERICA, APPELLEE

v.

WILLIE FOSTER SELLERS, APPELLANT

Appeal from the United States District Court for the Western District of North Carolina.

This cause came on to be heard on the record from the United States District Court for the Western District of North Carolina, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, set aside; the case is remanded to the United States District Court for the Western District of North Carolina, at Shelby, for proceedings consistent with the opinion of this Court filed herewith.

Filed, April 10, 1975.

WILLIAM K. SLATE, II, *Clerk.*

APPENDIX C

18 U.S.C. 2113, the federal bank robbery statute, provides:

(a) Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association; or

Whoever enters or attempts to enter any bank, credit union, or any savings and loan association, or any building used in whole or in part as a bank, credit union, or as a savings and loan association, with intent to commit in such bank, credit union, or in such savings and loan association, or building, or part thereof, so used, any felony affecting such bank, credit union, or such savings and loan association and in violation of any statute of the United States, or any larceny—

Shall be fined not more than $5,000 or imprisoned not more than twenty years, or both.

(b) Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value exceeding $100 belonging to, or in the care, custody, control, management, or possession of any bank, credit union, or any savings and loan association, shall be fined not more than $5,000 or imprisoned not more than ten years, or both; or

Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value not exceeding $100 belonging to, or in the care, custody, control, management, or possession of any

bank, credit union, or any savings and loan association, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

(c) Whoever receives, possesses, conceals, stores, barters, sells, or disposes of, any property or money or other thing of value knowing the same to have been taken from a bank, credit union, or a savings and loan association, in violation of subsection (b) of this section shall be subject to the punishment provided by said subsection (b) for the taker.

(d) Whoever, in committing, or in attempting to commit, any offense defined in subsections (a) and (b) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined not more than $10,000 or imprisoned not more than twenty-five years, or both.

(e) Whoever, in committing any offense defined in this section, or in avoiding or attempting to avoid apprehension for the commission of such offense, or in freeing himself or attempting to free himself from arrest or confinement for such offense, kills any person, or forces any person to accompany him without the consent of such person, shall be imprisoned not less than ten years, or punished by death if the verdict of the jury shall so direct.

(f) As used in this section the term "bank" means any member bank of the Federal Reserve System, and any bank, banking association, trust company, savings bank, or other banking institution organized or operating under the laws of the United States, and any bank the deposits of which are insured by the Federal Deposit Insurance Corporation.

(g) As used in this section the term "savings and loan association" means any Federal savings and loan association and any "insured institution" as defined

in section 401 of the National Housing Act, as amended, and any "Federal credit union" as defined in section 2 of the Federal Credit Union Act.

(h) As used in this section the term "credit union" means any Federal credit union and any State-chartered credit union the accounts of which are insured by the Administrator of the National Credit Union Administration.

U.S. GOVERNMENT PRINTING OFFICE: 1979

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1476

UNITED STATES OF AMERICA,
Petitioner,

vs.

WILLIE FOSTER SELLERS,
Respondent.

ON CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR RESPONDENT SELLERS

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MEMORANDUM FOR RESPONDENT SELLERS

STATEMENT

The statement of the case and of the facts as contained in the Government's Petition are substantially correct for present purposes. It is to be noted, however, that while the robbery occurred in Fallston, North Carolina, on August 9, 1973, it was not until September 25, 1973, in Atlanta, Georgia (TR. 251), that Sellers' apartment was searched. We think that the record will reflect that he was subsequently indicted on the charges for which he was tried. It was the September 25, 1973, search of Sellers' apartment during which the $33,150 in cash, including $500 of the "bait" money was discovered. The unlawfulness of that search is, in part, the subject of Sellers' Petition in No. 74-6503, which is now before this Court.

RESPONSE TO GOVERNMENT'S PETITION

In *Milanovich* v. *United States*, 365 U.S. 551, a case arising in the Fourth Circuit, this Court was concerned with convictions of theft and receiving stolen money from a commissary store at a Naval Base, in violation of 18 USC 641. The trial court had approved the verdict and imposed concurrent sentences. On appeal to the Fourth Circuit, that court, with one judge dissenting (275 F.2d 716), based upon *Heflin* v. *United States*, 358 U.S. 415, set aside the concurrent sentence imposed on the receiving count, but affirmed as to the theft count. In this Court it was argued that the relief granted was not enough; that the theft count should also be reversed and the case remanded for a new trial. The argument followed that although the evidence would support a conviction for either the theft or the receiving, the jury should have been instructed that it could not convict for both. This Court agreed and reversed the case for a new trial.

In *Heflin* this Court had not required a new trial where the petitioner had been sentenced to consecutive terms upon conviction of theft and receiving, but had merely set aside the conviction for receiving. The different result was reached in *Milanovich*, as was stated by the Court, for the reason that in *Heflin* the Court was not concerned with the correctness of any jury instructions, that case being a collateral proceeding to correct an illegal sentence where the petitioner was asking only that the cumulative punishment imposed for receiving be set aside. This Court granted the only relief sought in that case. The *Milanovich* case, by contrast, was a direct review of the convictions, presenting the entire record of the trial. The Court pointed out that it was impossible to know what verdict would have been returned had the

jury been properly instructed. In explaining why a new trial was necessary, the Court stated (365 U.S. 554, 555-556):

> Though setting aside the shorter concurrent sentence imposed upon the wife for receiving, the Court of Appeals left standing a ten-year prison term for larceny, double the punishment that had been imposed on the husband for the identical offense. Yet there is no way of knowing whether a properly instructed jury would have found the wife guilty of larceny or of receiving (or, conceivably, of neither). Thus, we cannot say that the mere setting aside of the shorter concurrent sentence sufficed to cure any prejudice resulting from the trial judge's failure to instruct the jury properly. It may well be, as the Court of Appeals assumed, that the jury, if given the choice, would have rendered a verdict on the larceny count, and that the trial judge would have imposed the maximum ten-year sentence on that count alone. But for a reviewing court to make those assumptions is to usurp the functions of both the jury and the sentencing judge.

That statement of the Court, made in 1961, is equally true today and is applicable to this case. Here, just as in *Milanovich*, Sellers was convicted under the instructions of the trial court which permitted convictions for antithetical, separate, distinct and incompatible offenses. The offenses were distinct in time and were proved at trial by distinctly separate evidential facts. As is admitted by the Government in its brief in *United States* v. *Gaddis*, No. 74-1141, page 24,

> Because *Milanovich* involved separate criminal transactions proved at trial with separate evidence, it was arguably appropriate for the Court implicitly to con-

clude that there was no priority between the offenses and to allow the jury to express a preference unbridled by rules of priority.

This Court, in deciding *Milanovich* subscribed to Judge Sobeloff's dissent from the majority opinion of the Fourth Circuit (275 F.2d 716, 721). This does not necessarily mean that this Court adopted his reasoning and all that is said in the dissent, but reference to it will disclose that he rejected the arguments urged here by the Government. At page 724, after rejecting the Government's arguments, Judge Sobeloff said:

> To summarize: Just as it is not for judges, but for the jury, where a jury trial has been prayed, to find a verdict of guilty, however plain the case may appear to be, so judges may not assume to choose between alternatives available to the jury. Judges may not do so even for the laudable purpose of preventing the possibility of error on the jury's part. Likewise, if guilt is pronounced on two counts where under proper instructions conviction could be permitted on only one, neither the district judge nor the appellate judges may take it upon themselves to speculate which count the twelve jurors would have unanimously picked if they had been correctly instructed. Virginia Milanovich was entitled to have the choice made under proper instructions by the jury before whom she elected to be tried; without this she may not be deprived of her liberty.

The Fourth Circuit in this case concluded correctly that the case was improperly submitted to the jury under instructions which allowed the jury to convict Sellers of both possession of stolen bank funds under 18 USC 2113(c) and theft of the same funds under 18 USC 2113(a), (b)

and (d). This opinion was consistent with its earlier opinion in *United States* v. *Harris*, 4 Cir., 346 F.2d 183; with *Heflin* and *Milanovich*; and with *Thomas* v. *United States*, 5 Cir., 418 F.2d 567; *Jenkins* v. *United States*, 10 Cir., 361 F.2d 615; *United States* v. *Abercrombie*, 5 Cir., 480 F.2d 961; *Baker* v. *United States*, 5 Cir., 357 F.2d 11; *United States* v. *O'Neil*, 9 Cir., 436 F.2d 571; *United States* v. *Roach*, 3 Cir., 321 F.2d 1; *Glass* v. *United States*, 10 Cir., 351 F.2d 678; *United States* v. *Suel*, 5 Cir., 435 F.2d 1272; *O'Claire* v. *United States*, 1 Cir., 470 F.2d 1199; *United States* v. *White*, 5 Cir., 440 F.2d 978; and *Forrester* v. *United States*, 5 Cir., 456 F.2d 905, among others. cf. *Keating* v. *United States*, 9 Cir., 413 F.2d 1038, a 28 USC 2255 proceeding.

Since the decision below is correct in its recognition of the existing law applicable to the multiple convictions as to both theft and receiving (or possession), the effort of the Government to obtain review of this decision and/or to persuade this Court to overrule *Milanovich* should be denied. We most earnestly urge, however, that Sellers' Petition for the Writ in 74-6503 be granted as to all questions there presented.

CONCLUSION

For the reasons stated herein, the cross-petition of the United States for the writ of certiorari in this case should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned does hereby certify that true copies of the foregoing Response to Cross-Petition of the United States for a Writ of Certiorari were deposited in the United States Post Office, postage prepaid, addressed to Robert H. Bork, Solicitor General of the United States, Department of Justice, Washington, D.C., this date.

This the 21st day of October, 1975.

ROBERT B. THOMPSON